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TEMPORARY INTERSTATE TRANSACTIONAL PRACTICE IN THE UNITED STATES AND EUROPE— KEEPING UP WITH MODERN COMMERCIAL REALITIES

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Abstract: The globalization of the financial markets and technological innovation have contributed to a broad geographical expansion of corporations' areas of interest. Providers of legal services seek to break through established local barriers to practice law in order to better cater to their clients' needs. The European Union has been increasingly liberalizing interstate transactional practice of law within its member States. In the United States, on the other hand, there is a lack of jurisprudence permitting such practice. This Note examines the limits imposed by past decisions of the U.S. Supreme Court in the area of interstate transactional practice and argues in favor of a more liberal approach, through an expansive application of the Privileges and Immunities Clause doctrine.

INTRODUCTION

Globalization of the financial markets and the increasing enlargement of multi-national corporations' areas of interest have created the need for legal services to break through traditionally established local barriers to practice.¹ The United States' economy and business, under major advancements in technology, is becoming increasingly global in nature.² Law firms, in order to remain competitive and cater to their clients' needs, must be able to operate in areas frequently far away from their headquarters.³ The tension between law firms' need to break through local barriers to practice and the

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¹ See Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 *FORDHAM INT'L. L.J.* 1039, 1039–40 (2002).

² See Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 *FLA. ST. U. L. REV.* 1339, 1341 (2002).

³ See Silver, *supra* note 1, at 1039.

established legal limitations stifling this process resulted in the liberalization, within the last twenty-five years, of the rules governing interstate legal practice in the European Union (EU).⁴

The European Court of Justice (ECJ), through its jurisprudence, liberally interpreted the provisions of Articles 49 and 50 of the European Community Treaty (EC Treaty) and permitted lawyers to carry out interstate transactional practice with few limitations.⁵ On the other hand, in the United States, there is a lack of jurisprudence permitting such practice.⁶ Although the Supreme Court ruled that lawyers may invoke the protection of Article 4's Privileges and Immunities Clause in cross-state practice, these decisions involved the rights of nonresident lawyers to be admitted to a particular state bar.⁷ The Supreme Court has not yet considered whether the Privileges and Immunities Clause would grant nonresident lawyers the right to provide temporary interstate transactional services in states where they are not admitted to the bar.⁸

The liberalization of interstate legal practice is an important goal to be accomplished if the legal profession wants to keep up with the globalization of the world economy.⁹ Countries around the world are already attempting to coordinate a common strategy to deal with a fu-

⁴ See generally Roger J. Goebel, *The Liberalization of Interstate Legal Practice in The European Union: Lessons for The United States*, 34 INT'L LAW. 307, 307-08 (2000). The European Union is an advanced form of multisectoral integration, its competence extending to the economy, industry, politics, citizens' rights, and foreign policy of its Member States. See *id.* at 307 n.2. The European Union was created by the Treaty on European Union, often referred to as the Treaty of Maastricht after the city in which it was signed on February 7, 1992. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1.

⁵ See Goebel, *supra* note 4, at 339. The European Community is at the core of the European Union and its original name was the European Economic Community when it was created by the Treaty of Rome on March 25, 1957. See *id.* at 307 n.2. The Treaty of Amsterdam significantly amended the EC Treaty, the EU Treaty and certain other documents, resulting in the renumbering of the articles as of May 1, 1999. See Goebel, *supra* note 4, at 307 n.2, citing Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1. Most recently the Treaty of Nice, signed at Nice on February 26, 2001, amended the EC Treaty, the EU Treaty and certain other documents. Treaty of Nice, Feb. 6, 2001, 2001 O.J. (C 80) 1. Reference to the numbering will be made with respect to the most recent consolidated version of the Treaty establishing the European Community. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 1 [hereinafter EC Treaty].

⁶ See Goebel, *supra* note 4, at 340.

⁷ See *Barnard v. Thorstenn*, 489 U.S. 546, 549 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 61 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 275 (1985).

⁸ See Goebel, *supra* note 4, at 322.

⁹ See Davis, *supra* note 2, at 1340-41.

ture internationalization of the legal profession.¹⁰ For example, the General Trade Agreement on Trade in Services (“GATS”) is one of a number of agreements that were reached in conjunction with the creation of the World Trade Organization in 1994.¹¹ Legal services are among the trade issues covered by the GATS, and the agreement calls for member nations, including the United States, to develop rules that will make it possible for lawyers from one country to practice in other countries.¹² Maybe it is time for the Supreme Court to adopt a more liberal jurisprudence along the lines of that adopted by the ECJ and reexamine the application of the Privileges and Immunities Clause to transactional interstate practice.¹³

Part I of this Note describes to what extent the Supreme Court expressly applied the protection of the Privileges and Immunities Clause to interstate legal practice. The Note then addresses the lack of a settled jurisprudence dealing with cross-border transactional services by nonresident lawyers in jurisdictions where they are not licensed. The Note then briefly addresses three cases demonstrating the sanctions faced by lawyers engaged in transactional practice in states where they have not been admitted to the bar. Part II presents the status of the law addressing interstate transactional practice in the EU, highlighting the relevant provisions of the EC Treaty, as interpreted by the ECJ in its most important landmark cases. Part III argues that, in the interest of harmony among the legal systems, as demanded by the increasing globalization of the world’s leading economies, the Supreme Court should reexamine the limits imposed by past decisions in the area of transactional interstate practice and apply the Privileges and Immunities of Article 4 of the U.S. Constitution.

I. INTERSTATE LEGAL PRACTICE IN THE UNITED STATES

A. *Right of Nonresident Lawyers to Be Admitted to a State Bar: The Piper-Friedman-Barnard Trilogy*

The U.S. Constitution does not contain an express statement setting forth the freedom to provide interstate professional services.¹⁴ “Since the founding of the Republic, the licensing and regulation of

¹⁰ See Martha Neil, *Getting the Lowdown on GATS*, 2 No. 26 A.B.A.J. E-REP. 2 (2003).

¹¹ See *id.*

¹² See *id.*

¹³ See generally Goebel, *supra* note 4, at 345.

¹⁴ See *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.”¹⁵ Qualifications for admission to practice and the standards of professional conduct are established by the states.¹⁶ Consequently, the general rule of unauthorized practice of law is that only lawyers who have passed the bar in one state are authorized to practice law in that state.¹⁷

Section 1 of the Fourteenth Amendment of the U.S. Constitution states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.”¹⁸ This passage, referred to as the Privileges and Immunities Clause, “was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.”¹⁹ When analyzing a claim under the Privileges and Immunities Clause, the courts adopt a two-step process.²⁰ First, the court establishes whether the activity in question is “sufficiently basic to the livelihood of the nation” so as to fall within the scope of the protection of the Clause.²¹ Second, the court invalidates the discriminating conduct only if it concludes that the restriction is not closely related to the advancement of a substantial state interest.²²

The first case involving the application of the Privileges and Immunities analysis to interstate legal services was the landmark decision *New Hampshire v. Piper*.²³ In that case, a Vermont resident brought an action against the New Hampshire Supreme Court challenging the residency requirement for admission to the bar.²⁴ The Court struck down the residency requirement as violative of the Privileges and Immunities Clause.²⁵ The Court reached its conclusion by applying a two-part analysis and reasoning that (i) the practice of law is important to the national economy and should be considered a fundamental right for the purposes of the Clause, and (ii) the residency requirement was not closely related to the advancement of a substantial state interest.²⁶

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Davis, *supra* note 2, at 1344.

¹⁸ U.S. CONST. amend. XIV, § 1.

¹⁹ See *Friedman*, 487 U.S. at 64, *quoting* *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

²⁰ See *Friedman*, 487 U.S. at 64.

²¹ See *id.* at 64–65.

²² See *id.* at 65.

²³ See *Piper*, 470 U.S. at 275.

²⁴ See *id.* at 275–77.

²⁵ See *id.* at 288.

²⁶ See *id.* at 281, 285.

The Court rejected the arguments that a nonresident lawyer would be less familiar with local rules or more prone to act unethically, and concluded that no substantial reason for the difference in treatment existed in this case.²⁷

In *Virginia v. Friedman*, the court once again dealt with the Privileges and Immunities Clause in the context of interstate legal services.²⁸ The issue before the Court involved the constitutionality of Virginia's residency requirement imposed on out of state lawyers seeking admission to the Virginia bar on motion without sitting for the local bar exam.²⁹ The Court struck down the residency requirement confirming the holding of *Piper* that "the practice of law . . . is sufficiently basic to the national economy to be deemed a privilege protected by the Clause."³⁰

Once again, under the second prong of the test, the Court failed to find a substantial state interest justifying discrimination against nonresident lawyers.³¹ In fact, the Court rejected the contentions that (i) only attorneys not admitted on motion would have a commitment to service and familiarity with Virginia law, and (ii) residency requirements facilitate enforcement of the full-time requirement of the regulation at stake.³²

Finally, in *Barnard v. Thorstenn*, the Court held that the Federal District Court for the Virgin Islands could not impose a one-year residence requirement before admission to its bar.³³ The Court confirmed that the practice of law is a privilege protected by the Privileges and Immunities Clause and the residency requirement was not substantially related to the state's interest in assuring that counsel would be available for appearances on short notice and would maintain an adequate level of professional competence.³⁴

B. *Temporary Interstate Transactional Practice in the United States*

The *Piper-Friedman-Barnard* trilogy of cases confirms that lawyers engaged in interstate practice may claim the protection of the Privileges and Immunities Clause when seeking admission to a particular

²⁷ See *id.* at 285–86.

²⁸ See *Friedman*, 487 U.S. at 61.

²⁹ See *id.*

³⁰ See *id.* at 66.

³¹ See *id.* at 68.

³² See *id.* at 67–68.

³³ See *Barnard*, 489 U.S. at 549, 558–59.

³⁴ See *id.* at 553, 557–58.

state bar.³⁵ However, the Supreme Court has not expressed an opinion on whether the Privileges and Immunities Clause affords protections to lawyers engaging in temporary interstate transactional practice.³⁶

Global business needs and technological innovations facilitate a law firm's ability to offer legal services to distant clients as efficiently as clients in the same community.³⁷

Under the current system, the participation of a corporate lawyer in closing activities taking place out of state may lead to sanctions by local courts for unauthorized practice of law.³⁸ Imagine the following scenario: a client running a corporate business in Florida asks a New York business lawyer to come to Florida and advise him in issuing securities to some targeted clients residing in Florida. The client requests the advice of that particular lawyer because he is a specialist in this area of law. This type of transactional legal advice is commonly tolerated; nevertheless, it falls into an area of uncertainty from a doctrinal point of view.³⁹

Case law shows that if the New York lawyer decides to advise his Florida client from his New York office by means of e-mail, phone, or fax, he may dodge disciplinary sanctions, yet not with absolute certainty.⁴⁰

Should, however, the New York lawyer decide to embark on a business trip to Florida in order to be present at some negotiation

³⁵ *Id.* at 558–59; *Friedman*, 487 U.S. at 70; *Piper*, 470 U.S. at 288.

³⁶ See Goebel, *supra* note 4, at 322.

³⁷ See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 669 (1995).

³⁸ See Goebel, *supra* note 4, at 327.

³⁹ See *id.*

⁴⁰ See *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5–6 (Cal. 1998) (holding that a New York law firm, which previously drafted for a California client a contract governed by California law, by offering legal services in connection with the drafted agreement, committed unauthorized practice of law and was barred from recovering legal fees). The California Supreme Court noted that, although very fact sensitive, advising a distant client through modern technological means can still trigger unauthorized practice of law. See *id.* at 5–6. Cf. *Fought & Company Inc. v. Steel Engineering and Erection, Inc.*, 951 P.2d 487, 491–92. (Haw. 1998) (authorizing the payment of legal fees to an Oregon law firm engaged in the representation of a Hawaii client involved in litigation against the State of Hawaii). Even though the Oregon firm did not file for *pro hac vice* appearance and merely supervised the litigation, the Hawaii Supreme Court failed to adopt the *Birbrower* approach, stressing that the economy is transforming from local to global in nature. See *Fought & Company*, 951 P.2d at 497.

proceedings on behalf of his client, case law shows that he may incur sanctions for unauthorized practice of law.⁴¹

In summary, the ability of a lawyer to advise a client, even upon request, when physically present in a state where he is not licensed to practice, presents very serious concerns due to sanctions for unauthorized practice of law.⁴²

II. TEMPORARY INTERSTATE TRANSACTIONAL PRACTICE IN EUROPE

In the EU, lawyers are free to offer interstate transactional legal services with few limitations.⁴³ The free movement of goods, persons, services, and capital is a cornerstone of the 1957 EC Treaty.⁴⁴

Article 49 of the EC Treaty provides for the abolition of restrictions on freedom to provide services within the Community whenever the provider of the service is established in a Member State different from the state of the recipient of the service.⁴⁵ Article 50 states that persons providing services cannot be subject to discrimination on the basis of their nationality whenever the service provider is temporarily pursuing activities in a host state.⁴⁶

The landmark case, *Van Binsbergen v. Bestuur*, discussed whether a Dutch lawyer authorized to handle administrative matters before Dutch tribunals could continue to do so after moving to Belgium.⁴⁷

⁴¹ See *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965) (holding that a California lawyer who spent a couple weeks in New York advising a New York resident in connection with a Connecticut divorce proceeding resulted in unauthorized practice of law). The court reasoned that the relevant section of the New York criminal statute and its policy is aimed "to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." *Id.*; see also *Ranta v. McCarney*, 391 N.W.2d 161, 162, 166 (N.D. 1986) (holding that a Minnesota tax lawyer who traveled several times to North Dakota to provide legal services to a client could not recover compensation for the services rendered in that state). The court in *Ranta* noted that the concept of legal practice included an attorney's rendering of tax advice and negotiating the sale of a client's business. See *Ranta*, 391 N.W.2d at 163.

⁴² See *Birbrower*, 949 P.2d at 5-6; *Spivak*, 211 N.E.2d at 331; *Ranta*, 391 N.W.2d at 166.

⁴³ See Goebel, *supra* note 4, at 339.

⁴⁴ See EC Treaty, *supra* note 5, art. 3.

⁴⁵ EC Treaty, *supra* note 5, art. 49. In order to render Community law effective, the doctrine of direct legal effect of the EC Treaty was developed by the European Court of Justice. See Goebel, *supra* note 4, at 310 n.22. The doctrine states that some treaty articles are sufficiently precise in their articulation of rights that may be given immediate effect by member state courts. See *id.*

⁴⁶ EC Treaty, *supra* note 5, art. 50.

⁴⁷ Case 33/74, *Van Binsbergen v. Bestuur Van De Bedrijfsvereniging Voor De Metaalnijverheid*, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 299 (1975); Goebel, *supra* note 4, at 310.

The Dutch authorities claimed that residency was a requirement for the lawyer to continue his practice.⁴⁸ The question before the ECJ was whether Articles 49 and 50 could have a direct legal effect in a national court proceeding providing immediate rights to the individuals.⁴⁹ The ECJ concluded that Articles 49 and 50 do have direct legal effect in a way that nationals of Member States can rely upon them to perform professional services in any other Member State.⁵⁰ The ECJ also established the principle that no Member State may discriminate against nationals of another state or apply its own nondiscriminatory rules regulating a profession unless the rules are justified by the general common good.⁵¹ In the case at bar, no "general good" was found in barring the Dutch lawyer from practicing before the Dutch tribunals while residing in Belgium, although Dutch professional responsibility regulations might govern the nonresident lawyer's practice.⁵²

The value of this precedent is great in that it not only prevents discrimination based on nationality, but also bars the application of state rules unless they are objectively justified by the general interest.⁵³

The *Van Binsbergen* decision had a major impact on the Council Directive on lawyers' freedom to provide services.⁵⁴ The Council Directive is the legal cornerstone for the rights of lawyers to provide interstate services on a temporary basis throughout the Member States.⁵⁵ It is noteworthy that Article 5 of the Council Directive sets forth a limit on cross border practice involving legal proceedings (presumably civil and criminal litigation before courts).⁵⁶ In litigation activities, the state in which the lawyer desires to practice may require him to work in conjunction with a lawyer member of the local bar.⁵⁷ However, by implication from Article 5, if a lawyer engages in transactional practice, he does not have to be associated with a local attorney.⁵⁸

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Case 33/74, *Van Binsbergen*, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 306 (1975).

⁵³ See Goebel, *supra* note 4, at 311. Council Directive 77/249, art.5., 1977 O.J. (L 77) 36 [hereinafter Council Directive].

⁵⁴ See Goebel, *supra* note 4, at 311; Council Directive 77/249, 1977 O.J. (L 78) 17.

⁵⁵ See Goebel, *supra* note 4, at 311.

⁵⁶ See Council Directive, *supra* note 53, art.5.

⁵⁷ See *id.*

⁵⁸ See Goebel, *supra* note 4, at 313.

The most important recent judgment applying the Council Directive is *Gebhard v. Milan Bar Council*.⁵⁹ The ECJ indicated the proper guidelines to determine whether a lawyer is providing services on a temporary basis or is becoming established in a particular Member State.⁶⁰ In that case, a German lawyer licensed to practice in Germany, moved his residence to Milan, opened his own office, and started representing German and Austrian clients in Italy with the aid of Italian lawyers.⁶¹ He also used the title “*avvocato*” on the letterhead of documents used for professional purposes and he appeared using the same title before the courts of Milan.⁶²

The ECJ held that the temporary nature of the provision of services at stake is to be determined in light of its duration, regularity, periodicity, and continuity.⁶³ Also, the court stressed that the provider of services may equip himself in the state where he seeks to exercise, with the infrastructures necessary for the purposes of performing the services in question.⁶⁴

Although Gebhard’s practice ultimately was not found to be within the category of temporary interstate service provider, the ECJ offered an extensive interpretation of the rights to provide temporary interstate legal services as previously set forth in the Council Directive.⁶⁵ Any lawyer or law firm from any Member State of the EU has a right to provide occasional, but not continuous, transactional legal service throughout any Member State of the EU as long as it is offered on a specific project.⁶⁶

III. APPLICATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE TO TEMPORARY INTERSTATE TRANSACTIONAL PRACTICE IN THE UNITED STATES

In this section, I suggest that courts might use the two-part analysis employed by the Supreme Court in *Piper*, *Friedman*, and *Barnard* to reach

⁵⁹ Case C-55194, *Gebhard v. Consiglio dell’Ordine degli Avvocati di Milano*, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1996).

⁶⁰ See Malcolm Jarvis, *Freedom of Establishment and Freedom to Provide Services—Lawyers on the Move*, 21 EUR. L. REV. 247, 247–252 (1996).

⁶¹ Case C-55194, *Gebhard*, 1995 E.C.R. I-4165.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See Jarvis, *supra* note 60, at 247–252.

⁶⁶ Goebel, *supra* note 4, at 317.

the conclusion that limiting temporary interstate transactional practice would violate the Privileges and Immunities Clause of Article 4.⁶⁷

Under the test, courts must first determine whether the activity in question is sufficiently basic to the livelihood of the Nation so as to fall within the scope of the protection of the Clause.⁶⁸ The Supreme Court held in *Piper*; and later confirmed in *Friedman* and *Barnard*, that the right to practice law is protected by the Privileges and Immunities Clause.⁶⁹ Interstate transactional practice is an aspect of practicing law, and therefore is protected by the Privileges and Immunities Clause.⁷⁰

Under the second part of the test, the issue is whether “(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.”⁷¹

In order to assess the presence of a substantial reason for the difference in treatment, it is important to look at the policies that stand behind the line of cases limiting interstate transactional practice.⁷²

These decisions, addressing interstate legal practice, emphasize the tension between the protection of economic efficiency on one side, and assurance of an ethical standard and representation from trained lawyers, on the other.⁷³

It is clear that promoting a liberalization of the legal restriction to practice in an interstate context would cater to those business clients “which can utilize their customary counsel throughout their market, whenever the lawyers are deemed by the client to be competent.”⁷⁴ Courts, however, seem to be more concerned about protecting the same clients against “the dangers of legal representation and advice given by persons not trained, examined and licensed for such work.”⁷⁵ Courts, arguably, seem to agree on the underlying assumption that an out of state lawyer might end up harming the client’s interests because of lack of training or competence with the local substantive laws.⁷⁶

Nevertheless, the Court has previously addressed these concerns in *Piper*; and later in *Barnard*, by holding that there is no evidence to

⁶⁷ See *Barnard*, 489 U.S. at 552–53; *Friedman*, 487 U.S. at 64–66; *Piper*, 470 U.S. at 283–84.

⁶⁸ See *Friedman*, 487 U.S. at 64–65; *Piper*, 470 U.S. at 279.

⁶⁹ See *Piper*, 470 U.S. at 281; *Barnard*, 489 U.S. at 553; *Friedman*, 487 U.S. at 65.

⁷⁰ See *Piper*, 470 U.S. at 281.

⁷¹ *Piper*, 470 U.S. at 284.

⁷² See *Birbrower*, 949 P.2d at 8; *Spivak*, 211 N.E.2d at 331.

⁷³ See *Birbrower*, 949 P.2d at 6; *Spivak*, 211 N.E.2d at 331.

⁷⁴ Goebel, *supra* note 4, at 340.

⁷⁵ *Spivak*, 211 N.E.2d at 331.

⁷⁶ See Goebel, *supra* note 4, at 342.

show that nonresidents might be less likely to keep abreast of local rules and procedures or practice law in a dishonest manner.⁷⁷ There are no reasons why such a rationale could not be applied to temporary interstate transactional practice as well.⁷⁸

Furthermore, the discrimination practiced against nonresidents does not bear a substantial relationship to the state's objective of assuring competent and honest representation to residents.⁷⁹ In fact, states have other, less restrictive means available than declaring interstate transactional practice illegal.⁸⁰ For example, a state may subject a practicing attorney, who seeks to advise clients inbound, to mandatory periodic legal education courses and apply to him the same ethical standards that already govern locally practicing attorneys.⁸¹

In one case, a district court actually attempted to apply the Privileges and Immunities protection to the context of interstate transactional practice.⁸² The court in *Spanos v. Skouras Theatres Corp.* reasoned that protection of the right of a client to obtain services of the lawyer of his choice should be protected.⁸³ The holding, however, was limited to the assistance of an out of state lawyer working in association with a local lawyer on a federal claim or defense.⁸⁴

CONCLUSION

In summary, the liberal approach adopted by the EU, with respect to temporary interstate transactional practice, appears to be more in consonance with modern commercial needs than the approach currently existing in the United States.⁸⁵

Maybe it is time for the U.S. courts to adopt a more liberal approach, with respect to cross-border transactional practice, through an application of the Privileges and Immunities Clause doctrine. The practice of law is a privilege under Article 4 jurisprudence⁸⁶ and a few considerations seem decisive in undercutting states' reasons for different treatment with respect to out of state transactional lawyers: (i)

⁷⁷ See *Barnard*, 489 U.S. at 555; *Piper*, 470 U.S. at 285.

⁷⁸ See Goebel, *supra* note 4, at 341.

⁷⁹ See *Friedman*, 487 U.S. at 68.

⁸⁰ See *Piper*, 470 U.S. at 285 n.19.

⁸¹ See *Friedman*, 487 U.S. at 69.

⁸² *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1964).

⁸³ See *id.*

⁸⁴ See *id.* at 171.

⁸⁵ See Davis, *supra* note 2, at 1341.

⁸⁶ See *Friedman*, 487 U.S. at 66.

citizens have a right to secure the legal services that they prefer;⁸⁷ (ii) competent and ethical out of state lawyers are not to be presumed to fail to familiarize themselves with local substantive law where necessary;⁸⁸ and (iii) states' barriers to interstate transactional practice create higher costs of representation for clients and represent economic protectionism of the local bar.⁸⁹

States have other less restrictive means available to achieve clients' protection against unqualified and unprofessional conduct such as subjecting the out of state lawyer to local ethical rules.⁹⁰ The EU approach indicates that the risks of disserving clients are minimal, and the undeniable advantages would accommodate modern clients' increasingly diverse commercial needs.⁹¹

⁸⁷ See *Spanos*, 364 F.2d at 170.

⁸⁸ See *Barnard*, 489 U.S. at 555.

⁸⁹ See Goebel, *supra* note 4, at 344.

⁹⁰ See *Pipe*, 470 U.S. at 284.

⁹¹ See Goebel, *supra* note 4, at 344-45.